

3) Amcell already provided switching and maintenance services for the system pursuant to the Construction and Switching Agreement.

4) Thompson met with members of senior management of Comcast Corporation (Amcell's ultimate parent company)<sup>120/</sup> and was impressed by them personally and with their qualifications and business success.<sup>121/</sup>

52. Accordingly, on September 8, 1988, Thompson and Amcell amended their Construction and Switching Agreement to provide that Amcell would -- subject to Thompson's oversight and control -- manage and operate the system on Thompson's behalf ("Management Agreement").<sup>122/</sup> Lokting negotiated the terms of the Management Agreement for Thompson.<sup>123/</sup> Thompson was consulted by Lokting throughout the negotiations process, and gave his final approval to the terms of the agreement.<sup>124/</sup>

53. The agreement specifies a ten-year term for Amcell's services, with two five-year renewal periods at Amcell's option.<sup>125/</sup> Thompson may terminate the agreement at any time

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<sup>120/</sup> In 1988, prior to the execution of the Management Agreement, Amcell was acquired by Comcast Cellular Communications, Inc. ("Comcast"), which in turn is a wholly-owned subsidiary of Comcast Corporation. The Atlantic City system is managed by Amcell of Atlantic City, Inc., which is a subsidiary of Amcell. All three entities are collectively referred to hereinafter as "Amcell".

<sup>121/</sup> Thompson Decl. ¶ 17.

<sup>122/</sup> Lokting Dep. Tr. page 12, lines 6-9; Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended).

<sup>123/</sup> Lokting Dep. Tr. page 12, line 24 through page 13, line 14; Lokting Dep. Tr. Exhibits 1 and 2 (different drafts of the Management Agreement showing Lokting's revisions to the agreement).

<sup>124/</sup> Lokting Dep. Tr. page 14, lines 7-9.

<sup>125/</sup> Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended).

for cause.<sup>126/</sup> Termination, however, has never been an issue because Thompson has been fully satisfied with Amcell's management of the system.<sup>127/</sup>

54. Under the Management Agreement, ETC pays Amcell a percentage of system revenue for its services.<sup>128/</sup> That percentage has been reduced twice at Thompson's insistence and the rate which was initially at 15% is now 7.5%.<sup>129/</sup>

55. Prior to commencement of construction, in September of 1988, Thompson traveled to Atlantic City to inspect the proposed cell site locations. Thompson also inspected the installed equipment at one of the cell sites for Amcell's neighboring system, and visited Amcell's Wilmington switching facility.<sup>130/</sup>

56. Amcell prepared a complete and detailed construction budget for Thompson's review. After reviewing the budget with Lokting, Thompson gave his approval and construction commenced.<sup>131/</sup> Throughout the course of the system's construction, Thompson and Lokting received frequent reports from Amcell, providing full details of all construction

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<sup>126/</sup> Thompson Dep. Tr. page 12, lines 5-7; Lokting Dep. Tr. page 96, lines 11-16.

<sup>127/</sup> Thompson Dep. Tr. page 12, lines 5-10 .

<sup>128/</sup> Thompson Dep. Tr. page 14, lines 13-21.

<sup>129/</sup> Thompson Dep. Tr. page 14, line 25 through page 15, line 8; Smith Dep. Tr. page 13, lines 1-5.

<sup>130/</sup> Thompson Decl. ¶ 22; Villecco Dep. Tr. page 13, lines 6-16.

<sup>131/</sup> Id.

expenditures.<sup>132/</sup> In addition, each piece of equipment ordered for the system required Thompson's approval and signature.<sup>133/</sup>

57. The entire cost of the construction was borne solely by ETC, through a loan financed by Provident Bank.<sup>134/</sup> Amcell provided no financial assistance in this regard.<sup>135/</sup>

58. Thompson was introduced to Provident Bank, which was the leading lender to the cellular industry at the time, by Amcell.<sup>136/</sup> Amcell had borrowed from Provident in the past and had a successful relationship with the bank.<sup>137/</sup> Thompson, with his counsel, met with bank representatives and negotiated a loan agreement initially in the amount of \$1,850,000. Over time the loan amount has been increased, and is now roughly \$2.9 million.<sup>138/</sup> The loan was negotiated for Thompson by Lokting; Amcell was not involved.<sup>139/</sup> Though ETC continues to hold the Provident loan, none of Amcell's current debt is with Provident.<sup>140/</sup>

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<sup>132/</sup> Id. at ¶ 23.

<sup>133/</sup> Villecco Dep. Tr. page 34, lines 1-7; Villecco Dep. Tr. Exhibit 3 (letter from Dominic Villecco to Thompson requesting Thompson's approval to amendments to equipment purchase order).

<sup>134/</sup> Thompson Dep. Tr. page 40, line 11 through page 41, line 15.

<sup>135/</sup> Van Horne Dep. Tr. page 16, line 20-23; Thompson Decl. ¶ 25.

<sup>136/</sup> Van Horne Dep. Tr. page 11, line 18 through page 12, line 2.

<sup>137/</sup> Van Horne Dep. Tr. page 14, lines 12-14.

<sup>138/</sup> Hillman Dep. Tr. page 59, line 17 through page 60, line 3.

<sup>139/</sup> Lokting Dep. Tr. page 78, line 22 through page 80, line 2; Van Horne Dep. Tr. page 20, line 24 through page 21, line 8.

<sup>140/</sup> Sauder Dep. Tr. page 19, lines 2-13.

59. ETC is the sole obligor under the Provident loan. The loan is secured by the system as well as Thompson's pledge of his stock in ETC.<sup>141/</sup> The loan is not cosigned or guaranteed in any form by Amcell or any other person.<sup>142</sup>

60. In June of 1989, the Atlantic City system commenced operations.<sup>143/</sup>

61. On November 23, 1990, Thompson and Amcell executed an amendment to the Construction and Switching Agreement which consolidated the system's management with Amcell's Wilmington system. Under the amendment, the Atlantic City system would be managed on Thompson's behalf out of the offices of Amcell's Wilmington system and would share the Wilmington system's personnel. The amendment included a formula for the allocation of shared costs between the two systems based, depending on the nature of the specific cost, on population, number of subscribers or system usage, as detailed in the attachment to the amendment entitled "Allocation of Costs."<sup>144/</sup> Thompson approved the cost allocation methodology.<sup>145/</sup> The sharing of office facilities and personnel has resulted in considerable cost savings for the Atlantic City system -- an estimated \$300,000 per year.<sup>146/</sup>

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<sup>141/</sup> Thompson Dep. Tr. page 41, lines 6-9.

<sup>142/</sup> Lokting Dep. Tr. page 79, lines 13-17; Van Horne Dep. Tr. page 20, line 24 though page 21, line 8.

<sup>143/</sup> See supra n. 6.

<sup>144/</sup> Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended).

<sup>145/</sup> Lokting Dep. Tr. page 53, lines 4-12.

<sup>146/</sup> Lokting Dep. Tr. page 52, lines 1-6; Panetta Dep. Tr. page 10, line 20 through page 11, line 3.

62. Despite sharing offices and a switch, the Atlantic City system and Amcell's Wilmington system are run independently.<sup>147/</sup> The two systems have separate marketing plans, separate rate structures, separate roaming agreements and different licensing agreements with Cellular One.<sup>148/</sup> From a technical standpoint there is no loss of control over the operation of specific cell sites resulting from the sharing of a switch. The Atlantic City system has its own cell group manager physically interconnecting the system's cells to the switch.<sup>149/</sup> If it became necessary for any reason, Thompson can order the Atlantic City cell sites shut down without affecting operations of Amcell's Wilmington system.<sup>150/</sup> This would require a single phone call and would be accomplished in 10-15 minutes. The process would be exactly the same if the system were operated with a stand-alone switching facility within the Atlantic City market.<sup>151/</sup>

63. In 1992, the system opened a retail sales and installation center in the Shore Mall in Pleasantville, New Jersey, a suburb of Atlantic City.<sup>152/</sup> Thompson was heavily involved in the project from the outset. In June of 1991, he and Lokting traveled to Atlantic City to inspect the proposed lease site.<sup>153/</sup> After approving the site, Thompson directed Amcell to enter

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<sup>147/</sup> Smith Dep. Tr. page 17, lines 15-24.

<sup>148/</sup> Smith Dep. Tr. page 17, lines 15-24; Thompson Dep. Tr. page 49, lines 3-13.

<sup>149/</sup> Dombroski Dep. Tr. page 42 lines 3-22.

<sup>150/</sup> Dombroski Dep. Tr. page 42 lines 3-9.

<sup>151/</sup> Dombroski Dep. Tr. page 41, line 20 through page 42, line 2.

<sup>152/</sup> Moerman Dep. Tr. page 33, line 6-25; Thompson Decl. \*\*.

<sup>153/</sup> Lokting Dep. Tr. page 63, lines 1-8; Thompson Decl. ¶ 30.

into negotiations with the landlord.<sup>154/</sup> Thompson reviewed and approved the \$300,000 construction budget and ETC was solely responsible for its financing, through the Provident Bank loan facility.<sup>155/</sup> The construction contract was prepared by Thompson's counsel and was entered into directly between ETC and the contractor.<sup>156/</sup> ETC purchased, and is the sole owner of, all the displays, furniture, equipment and telephones for the center.<sup>157/</sup>

64. In May of 1994, Amcell sought Thompson's review and approval of a proposal for the Atlantic City system to join the Industry Net Settlement Program ("INS").<sup>158/</sup> The INS is a national clearinghouse for roamer revenue payments which allows participating systems to make or receive a single monthly payment based on their net position.<sup>159/</sup> At the time, other Amcell markets had been members for a year and based on their positive results, the Amcell

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<sup>154/</sup> Id.

<sup>155/</sup> Id.; Moerman Dep. Tr. page 33, line 6 through page 34, line 18; Moerman Dep. Tr. Exhibit 3 (letter from John Moerman to Ellis Thompson requesting authorization to borrow against the Provident Bank loan facility to fund the construction of the retail store).

<sup>156/</sup> Thompson Decl. ¶ 30.

<sup>157/</sup> Id.

<sup>158/</sup> Panetta Dep. Tr. Exhibit 2 (letter from Mark Panetta to Ellis Thompson requesting that he review a proposal for the Atlantic City system to join the INS).

<sup>159/</sup> Moerman Dep. Tr. page 17, line 14 through page 18, line 4.

management team believed it would be advantageous for the Atlantic City system to join.<sup>160/</sup> After reviewing the proposal, ETC joined the program.<sup>161/</sup>

65. Recently, Amcell decided to change its switch in Wilmington from Motorola to AT&T-supplied equipment because of the AT&T switching system's technological flexibility and expandability and because of its attractive pricing.<sup>162/</sup> At that time, Amcell presented Thompson with several options for the Atlantic City system including continuing to operate the system using the Motorola switch in Wilmington, purchasing a smaller version of the Motorola switch for the Atlantic City system's dedicated use, or changing over the Atlantic City system to the new AT&T switch.<sup>163/</sup> After weighing the options, Thompson decided to switch the Atlantic City system to the new AT&T equipment.<sup>164/</sup> Thompson's decision was motivated by the same competitive and financial factors considered by Amcell.<sup>165/</sup>

66. After becoming operational in 1989, the system has been profitable in each succeeding year. As of January 1, 1995, the system serves, and provides seamless coverage to

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<sup>160/</sup> Panetta Dep. Tr. Exhibit 2 (letter from Mark Panetta to Ellis Thompson requesting that he review a proposal for the Atlantic City system to join the INS); Panetta Dep. Tr. page 26, lines 1-21.

<sup>161/</sup> Panetta Dep. Tr. page 26, lines 11-13.

<sup>162/</sup> Dombroski Dep. Tr. page 45 line 16, through page 46, line 13; Thompson Decl. ¶ 31.

<sup>163/</sup> Dombroski Dep. Tr. page 47 lines 1-12.

<sup>164/</sup> Dombroski Dep. Tr. page 47, lines 13-15.

<sup>165/</sup> Thompson Decl. ¶ 33.

well over 10,000 customers as well as countless roamers.<sup>166/</sup> The system currently has eleven cell sites,<sup>167/</sup> having originally been constructed with four.<sup>168/</sup>

67. Revenue, cash flow and income have consistently exceeded expectations.<sup>169/</sup>

2. Thompson's Control of the Atlantic City System

i. **Use of Facilities**

68. With the exception of the cellular switch shared with Amcell, ETC purchased, and holds legal title to, all of the cellular equipment utilized in the system,<sup>170/</sup> and is the lessee for all of the cell sites.<sup>171/</sup>

69. The system operates automatically. There are no personnel at any of the cell sites, each of which consists of a tower or antenna array and a locked shed containing the engineering

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<sup>166/</sup> Thompson Decl. ¶ 26.

<sup>167/</sup> Dombroski Dep. Tr. page 19 lines 18-20, errata page.

<sup>168/</sup> Thompson filed a minor amendment to his application on July 23, 1986, notifying the Commission that three of the four proposed cell sites had been replaced by others and that the fourth had been re-engineered accordingly. See Amendment to Application of Ellis Thompson, File No. 14251-CL-134-A-86. On June 15, 1989, Thompson filed a Form 489 notifying the Commission that the system had been constructed exactly in accordance with Thompson's authorization. See File No. 02632-CL-MP-89.

<sup>169/</sup> Lokting Dep. Tr. page 33, lines 23 through page 34, line 2.

<sup>170/</sup> Thompson Decl. ¶ 26; Villecco Dep. Tr. page 34, lines 1-7; Villecco Dep. Tr. Exhibit 3 (letter from Dominic Villecco to Thompson requesting Thompson's approval to amendments to equipment purchase order).

<sup>171/</sup> Hillman Dep. Tr. page 46, lines 1-8.



equipment.<sup>172/</sup> Thompson thus has no need to access the sites on a routine basis. When Thompson wishes to inspect any of the cell sites, Amcell arranges for a technician to escort him to the site and give him access.<sup>173/</sup> Over the years, Thompson has made several such inspection visits.<sup>174/</sup>

70. Thompson has also inspected the system's other facilities, including the retail center and the Wilmington office and switch.<sup>175/</sup> His most recent visit to the switch was during the last quarterly meeting in March of 1995.<sup>176/</sup>

71. Thompson has never been, and never will be, denied access to any of the system's facilities, including the Wilmington switch.<sup>177/</sup> Thompson has the same level of access to the switch and the Atlantic City cell sites as Amcell's own officers have to Amcell-owned cellular systems.<sup>178/</sup>

72. Thompson does not maintain a personal office in Atlantic City. While he has considered moving to Atlantic City, on the advice of counsel, Thompson determined that such

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<sup>172/</sup> Villecco Dep. Tr. page 14, line 9 through page 15, line 14.

<sup>173/</sup> Villecco Dep. Tr. page 15, lines 5-14; Dombroski Dep. Tr. page 44, line 23 through page 45, line 4.

<sup>174/</sup> Thompson Dep. Tr. page 28, lines 8-11.

<sup>175/</sup> Thompson Dep. Tr. page 30, lines 3-15; Villecco Dep. Tr. page 15, lines 15-18.

<sup>176/</sup> Dombroski Dep. Tr. page 45 lines 5-15.

<sup>177/</sup> Thompson Dep. Tr. page 30, lines 16-19.

<sup>178/</sup> Thompson Dep. Tr. page 30, lines 16-19; Villecco Dep. Tr. page 15, lines 5-14; Dombroski Dep. Tr. page 43, lines 13-16; Riley Dep. Tr. page 14, line 25 through page 16, line 7.

a move was not necessary.<sup>179/</sup> He is able to effectively exercise his oversight and control of the system from Washington state.<sup>180/</sup>

## **ii. Day-to-Day Operations**

73. Every action of Amcell in the routine administration of the system's day-to-day business under the Construction and Switching Agreement is subject to Thompson's "oversight and review"<sup>181/</sup> through quarterly meetings,<sup>182/</sup> annual budget approval,<sup>183/</sup> monthly and quarterly financial reporting,<sup>184/</sup> check signing,<sup>185/</sup> regular telephone conversations and written correspondence.<sup>186/</sup> Thompson can make changes to the daily routine of Amcell's employees involved in the Atlantic City system simply by instructing the appropriate Amcell officers accordingly.<sup>187/</sup> In addition, all non-routine activities require Thompson's express prior approval.<sup>188/</sup>

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<sup>179/</sup> Thompson Dep. Tr. page 32, line 17 through page 33, line 7.

<sup>180/</sup> Thompson Dep. Tr. page 33, lines 8-21.

<sup>181/</sup> Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended).

<sup>182/</sup> Lokting Dep. Tr. page 31, line 2 through page 33, line 3; Thompson Dep. Tr. page 15, lines 13-18.

<sup>183/</sup> Thompson Dep. Tr. page 15, line 19 through page 16, line 20.

<sup>184/</sup> Lokting Dep. Tr. page 68 line 13 through page 69, line 2.

<sup>185/</sup> Id.

<sup>186/</sup> Id.

<sup>187/</sup> Lokting Dep. Tr. page 69, lines 8-24.

<sup>188/</sup> Watson Dep. Tr. page 20, lines 18-23; Moerman Dep. Tr. page 13, lines 3-11. See discussion infra part III ¶¶ 82-91.

74. Thompson and his counsel travel to Comcast's headquarters Philadelphia quarterly to meet with Amcell management.<sup>189/</sup> At these meetings, all aspects of the system's operations are reviewed, including the following: the annual operating and capital budgets;<sup>190/</sup> subscriber and competitive marketing activity;<sup>191/</sup> revenues;<sup>192/</sup> expenses;<sup>193/</sup> and system expansion.<sup>194/</sup>

75. Thompson takes an active part in these meetings, often asking questions, offering ideas or suggesting alternatives to Amcell's proposals.<sup>195/</sup> Ultimately, he is responsible for all decisions made regarding the system.<sup>196/</sup>

76. In addition to the quarterly meetings in Philadelphia, Thompson maintains contact with his management team through regular telephone calls and correspondence.<sup>197/</sup> Directly, and through his attorney, David Lokting, Thompson is in regular contact with the senior members of Amcell's management team. Typically, Thompson and/or Lokting are in communication with

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<sup>189/</sup> Thompson Dep. Tr. page 27, lines 22 through page 28, line 3.

<sup>190/</sup> Lokting Dep. Tr. page 21, line 16 through page 33, line 1 and page 33, line 22 through page 34, line 10.

<sup>191/</sup> Lokting Dep. Tr. page 37, line 13 through page 38, line 15 and page 42, lines 5-25.

<sup>192/</sup> Lokting Dep. Tr. page 38, line 16 through page 39, line 14.

<sup>193/</sup> Id.

<sup>194/</sup> Lokting Dep. Tr. page 39, line 17 through page 41, line 11.

<sup>195/</sup> Lokting Dep. Tr. page 32, lines 10-12, page 57, lines 10-17.

<sup>196/</sup> Lokting Dep. Tr. page 57, lines 12-17.

<sup>197/</sup> Lokting Dep. Tr. page 68, line 15 through page 69, line 2; Moerman Dep. Tr. page 14, line 13 through page 16, line 8.

Ray Dombroski, Vice President for Engineering and New Technology, on a monthly basis;<sup>198/</sup> John Moerman, General Manager for the Atlantic City market, on a weekly basis;<sup>199/</sup> Anna Hillman, Senior Vice President for Finance and Administration, on a bi-monthly basis;<sup>200/</sup> David Watson, Senior Vice President for Sales and Marketing, on a bi-monthly basis;<sup>201/</sup> and Jeffrey Smith, Vice President and General Counsel, on a bi-weekly basis.<sup>202/</sup>

77. Numerous procedures are in place to ensure that Thompson maintains effective oversight, review and control of daily operations. For example, in 1989, Thompson and Amcell instituted a written policy which governed the signing of checks for the system. Thompson played an active role in the formulation and negotiation of the policy, particularly in the area of its specification of the various levels of approval.<sup>203</sup> Pursuant to that policy, Thompson's signature is required on all checks for non-recurring expenses in excess of \$5,000 and all checks for \$1,000 or more must be signed by Amcell's Vice President for Finance.<sup>204/</sup> For certain specified categories of recurring expenses, Thompson's signature is only required for checks in excess of \$25,000 and the Vice President for Finance's signature is only required on checks of

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<sup>198/</sup> Dombroski Dep. Tr. page 14, line 21 through page 15, line 2.

<sup>199/</sup> Moerman Dep. Tr. page 15, line 24 through page 16, line 8. 3-8.

<sup>200/</sup> Hillman Dep. Tr. page 12, lines 1-17.

<sup>201/</sup> Watson Dep. Tr. page 16, lines 12-14.

<sup>202/</sup> Smith Dep. Tr. page 20, lines 17-23.

<sup>203/</sup> Lokting Dep. Tr. page 24, lines 1-19.

<sup>204/</sup> Lokting Dep. Tr. Exhibit 6 (Check Signing Policy).

\$5,000 or more.<sup>205/</sup> This exception to the general policy permits Amcell to make timely payments of routine system expenses.<sup>206/</sup> Under procedures designed by Lokting, Thompson receives copies of all checks issued by the system and the associated invoices and purchase orders.<sup>207/</sup> This process, coupled with the signature requirements, allows Thompson and Lokting to keep close track of ETC's expenses.<sup>208/</sup>

78. On March 9, 1995, Thompson approved an amendment to the check signing policy to allow Amcell to issue checks for agent commissions without his signature, regardless of amount.<sup>209/</sup> Amcell originally requested that all recurring expenses be exempt from the check signing policy. Thompson rejected this proposal, but agreed to the limited exception of agent commissions because of the increasing level of agent activity and Amcell's resulting difficulties in meeting check delivery commitments in a timely manner.<sup>210/</sup> In agreeing to the amendment, Thompson insisted that two safeguards be put in place. First, Thompson receives by telecopy a summary of all checks issued thereunder. Second, Amcell must certify that the amount of the checks are proper, in accordance with the agency contract under which they are paid.<sup>211/</sup>

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<sup>205/</sup> Id.

<sup>206/</sup> Hillman Dep. Tr. page 36, lines 4-11.

<sup>207/</sup> Panetta Dep. Tr. page 20, line 16 through page 21, line 4.

<sup>208/</sup> Id.

<sup>209/</sup> Moerman Dep. Tr. page 30, lines 1-23; Moerman Dep. Tr. Exhibit 2 (letter from John Moerman to Thompson requesting an amendment to the check signing policy to allow Amcell to issue all checks for agent commissions without Thompson's signature).

<sup>210/</sup> Hillman Dep. Tr. page 36, lines 16-22.

<sup>211/</sup> Lokting Dep. Tr. page 53, line 24 through page 54, line 25. Compare Moerman Dep. Tr.  
(continued...)

79. As of the date of Amcell's document production in this hearing, over 3,000 checks were signed by Thompson in accordance with the check signing policy. Checks requiring Thompson's signature are sent on a weekly basis, along with a cover letter and invoices, to David Lokting. After conducting a preliminary review of the checks and verifying their amounts against the accompanying invoices, Lokting forwards them to Thompson.<sup>212/</sup> Thompson then reviews the checks and invoices himself and, if everything is in order, signs the checks for return to Amcell.<sup>213/</sup> If a check is for a large amount, or is otherwise unusual, Thompson questions the expense.<sup>214/</sup> For example, because of the large number of new customers who joined the system during the 1994 Christmas season, the monthly check for new cellular phones for that month was \$300,000. Since this was an unusually large expenditure for new phones, Thompson telephoned Amcell for an explanation.<sup>215/</sup>

80. Thompson also keeps abreast of daily operations through the receipt of reports from Amcell detailing the status of operations, including monthly and quarterly financial statements.<sup>216/</sup>

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<sup>211/</sup>(...continued)

Exhibit 2 and 2(A) (different drafts of the amendment showing the addition of the safeguards insisted on by Thompson). Exhibit 2(A) is the final version executed by Thompson and thereby instituted as policy

<sup>212/</sup> Lokting Dep. Tr. page 55, lines 15-18, 25 through page 56, line 12.

<sup>213/</sup> Lokting Dep. Tr. page 56, lines 2-12.

<sup>214/</sup> Lokting Dep. Tr. page 56, line 14 through page 57, line 5; Panetta Dep. Tr. page 21, lines 5-15.

<sup>215/</sup> Lokting Dep. Tr. page 56, line 24 through page 57, line 5.

<sup>216/</sup> Lokting Dep. Tr. page 68, line 13 through page 69, line 2; Sauder Dep. Tr. page 9, line 19 through page 10, line 5.

81. Thompson takes pride in the financial and technical success of his system.<sup>217/</sup> He has educated himself regarding both the technical and business aspects of the cellular industry, and over the years has become quite knowledgeable.<sup>218/</sup> For example, Thompson has independently notified Amcell's Vice President of Engineering about technical issues affecting the land mobile industry.<sup>219/</sup>

### iii. Policy Decisions

82. Thompson is ultimately responsible for all policy decisions concerning the Atlantic City system.<sup>220/</sup> Typically, a proposal for the system will originate at the local level in the engineering, sales and marketing or finance department.<sup>221/</sup> It is then sent to the appropriate Amcell vice president for his or her review.<sup>222/</sup> After further discussions at the corporate level, the proposal is communicated to Thompson.<sup>223/</sup> Thompson then analyzes the proposal, discusses it with Lokting and the Amcell management team, and makes any changes he deems

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<sup>217/</sup> Thompson Dep. Tr. page 47, line 13 through page 48, line 1.

<sup>218/</sup> Id.

<sup>219/</sup> Dombroski Dep. Tr. page 11, line 15 through page 12, line 9.

<sup>220/</sup> Thompson Dep. Tr. page 15, lines 9-21. For example, Thompson approved the construction of the Pleasantville retail facility, the system's joining the INS, and the switch to AT&T network equipment as detailed in Section III(c)(1) above.

<sup>221/</sup> Thompson Dep. Tr. page 30, lines 12-13.

<sup>222/</sup> Thompson Dep. Tr. page 30, lines 14-15.

<sup>223/</sup> Thompson Dep. Tr. page 30, lines 15-21.

necessary. If and when he is satisfied, he communicates his approval to Amcell, and the proposal is thereafter adopted.<sup>224/</sup>

83. Some proposals are initiated by Thompson himself. For example, on at least one occasion, Thompson has instructed Amcell personnel that he wanted to purchase, rather than lease a cell site. Pursuant to those instructions, Amcell researched purchasing the property but ultimately Thompson decided it would be too expensive to do so.<sup>225/</sup>

84. One way in which Thompson exercises his policy oversight is through his review and approval of the operating and capital budgets in advance of each fiscal year. Thompson has the authority to object to any budget item on a line-by-line basis;<sup>226/</sup> if Amcell cannot justify a budget item, it is eliminated.<sup>227/</sup> Any expenditure in excess of what is budgeted for a specific line-item must be pre-approved by Thompson, even if the overall budget is not exceeded.<sup>228/</sup>

85. Thompson has, in fact, overruled the proposed capital budget every year.<sup>229/</sup> Each year, Amcell recommends that ETC build as many cells as are necessary in Amcell's opinion to optimize the system's coverage at a cost of up to several million dollars. Thompson, however, is wary about the system incurring excessive debt and typically asks Amcell's engineering department for a less ambitious alternative proposal that will nevertheless provide

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<sup>224/</sup> Hillman Dep. Tr. page 30, lines 18-21.

<sup>225/</sup> Villecco Dep. Tr. page 12, lines 4-18.

<sup>226/</sup> Thompson Dep. Tr. page 27, lines 4-16; Villecco Dep. Tr. page 29, line 2 through page 30, line 10.

<sup>227/</sup> Thompson Dep. Tr. page 27, line 4-16.

<sup>228/</sup> Villecco Dep. Tr. page 30, lines 1-11.

<sup>229/</sup> Hillman Dep. Tr. page 27, line 14 through page 28, line 6.



sufficient coverage with fewer cell sites.<sup>230/</sup> For example, in 1994, Amcell suggested the construction of eight new cell sites for the coming year.<sup>231/</sup> Ultimately, however, Thompson opted not to construct any new cell sites and instead authorized only the completion of three new cell sites that were approved in the prior year and the relocation of one existing cell site.<sup>232/</sup>

86. Thompson is responsible for setting customer rates and activation fees for service in Atlantic City<sup>233/</sup> and must approve any change in rate plans proposed by Amcell.<sup>234/</sup> The rates charged by the Atlantic City system reflect the competitive conditions in that market and are not the same as those charged by Amcell in its neighboring markets.<sup>235/</sup>

87. Thompson's approval and signature is required for all contracts entered into by the system including: roamer arrangements with other markets;<sup>236/</sup> hand-off agreements with

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<sup>230/</sup> Hillman Dep. Tr. page 28, lines 3-6; Villecco Dep. Tr. page 17, line 14 through page 18, line 5; Villecco Dep. Tr. Exhibit 1, page 3. ¶ 3 (minutes of November 10, 1993 quarterly meeting reflecting Thompson's instruction to Villecco to prepare alternative engineering proposal).

<sup>231/</sup> Hillman Dep. Tr. page 29, lines 2-4.

<sup>232/</sup> Lokting Dep. Tr. page 40, line 22 through page 41, line 11.

<sup>233/</sup> Thompson Dep. Tr. page 20, line 22 through page 21, line 2.

<sup>234/</sup> Watson Dep. Tr. page 32, line 24 through page 33, line 8; Watson Dep. Tr. Exhibit 3 (letter from David Watson to David Lokting transmitting a proposed new rate plan for 1993 for Thompson's review and approval); Watson Dep. Tr. Exhibit 4 (letter from Watson to Thompson requesting approval for new rate plan for 1994); Moir Dep. Tr. Exhibit 2 (internal Amcell memorandum regarding a proposed new rate plan for 1991, with hand-written notes indicating the plan must be pre-approved by Thompson).

<sup>235/</sup> Watson Dep. Tr., page 35, line 6 through page 36, line 3; Lokting Dep. Tr. page 25, lines 15-21.

<sup>236/</sup> Thompson Dep. Tr. page 19, lines 13-20; Moerman Dep. Tr. Exhibit 5 (letter from John Moerman to Thompson transmitting an amendment to one of the system's Inter-carrier Roamer Agreements for his review and signature).

neighboring systems;<sup>237/</sup> the system's licensing agreement with Cellular One, which provides for the system's use of the Cellular One brand name;<sup>238/</sup> cell site leases;<sup>239/</sup> and agency contracts with third-party distributors.<sup>240/</sup>

88. Thompson approves all engineering modifications to the system, including the addition of cell sites, changes in antennas at any of the cell sites, and the sectorization of cells.<sup>241/</sup> Thompson also must approve all signal extensions of other systems into the Atlantic City system.<sup>242/</sup> When a neighboring system requests such an extension, Amcell personnel prepare for Thompson an analysis outlining the extension's impact on the system. Thompson then reviews the proposal and decides whether to approve the extension.<sup>243/</sup>

89. Thompson is ultimately responsible for all FCC filings pertaining to the system. Consistent with Paragraph 4A.2(h) of the Construction and Switching Agreement, Amcell forwards any proposed applications or other filings in draft form to Thompson's FCC counsel,

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<sup>237/</sup> Thompson Dep. Tr. page 22, lines 12-19.

<sup>238/</sup> Thompson Dep. Tr. page 21, line 24 through page 22, line 6.

<sup>239/</sup> Thompson Dep. Tr. page 24, lines 4-9; Dombroski Dep. Tr. Exhibit 3 (letter from Ray Dombroski to David Lokting transmitting a cell site lease agreement for Thompson's review and signature).

<sup>240/</sup> Watson Dep. Tr. page 12, lines 11-20.

<sup>241/</sup> Thompson Dep. Tr. page 23, line 25 through page 24, line 9; Hillman Dep. Tr. page 27, line 16 through page 28, line 6; Dombroski Dep. Tr. page 26, line 21 through page 27, line 3; Dombroski Dep. Tr. Exhibit 4 (letter from Ray Dombroski to Ellis Thompson transmitting a coverage plot for the Atlantic City system for Thompson's review).

<sup>242/</sup> Villecco Dep. Tr. page 39, line 25 through page 41, line 3.

<sup>243/</sup> Id.; Villecco Dep. Tr. Exhibit 6 (letter from Ellis Thompson to neighboring system granting consent for an extension into Atlantic City in exchange for an extension from the Atlantic City system into the neighboring system).

Fleischman and Walsh, L.L.P. The firm reviews the material, makes changes as required, and, following Thompson's final review and execution, makes the appropriate filing with the FCC.<sup>244/</sup>

90. Thompson is also in control of setting all policy regarding the prosecution of litigation involving TDS and Amcell before the FCC and the courts; Amcell has never sought to impose its will on Thompson regarding his stance on litigation and Thompson has always chosen his own path.<sup>245/</sup> One example illustrating this point occurred in 1988 when Amcell filed a Petition for Conditional Grant with the Commission concerning the elimination of paragraph 16 from the Thompson/TDS Agreement. Thompson filed independent comments,<sup>246/</sup> asserting that he would accept a grant with or without the abrogation of paragraph 16.

91. Amcell makes it clear to third parties with whom the system does business that it is only the system's manager, and that Thompson as owner and licensee is ultimately responsible for all business decisions.<sup>247/</sup> Similarly, Amcell's Atlantic City management team instructs its employees regarding Amcell's role in the system.<sup>248/</sup>

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<sup>244/</sup> Lokting Dep. Tr. Exhibit 1 (Construction and Switching Agreement, as amended); Thompson Decl. ¶ 34.

<sup>245/</sup> Thompson Decl. ¶ 35.

<sup>246/</sup> Ellis Thompson, Response to Petition for Conditional Grant, filed January 28, 1988.

<sup>247/</sup> Smith Dep. Tr. page 30, lines 8-16; Villecco Dep. Tr. page 27, lines 1-13 (in negotiating lease agreements for cell sites, Amcell personnel always make it explicitly clear that Thompson is the licensee, and that Amcell is only a management agent negotiating on his behalf); Moerman Dep. Tr. page 40, lines 4-12 (Amcell's General Manager for Atlantic City informed a potential reseller that Amcell is only the management agent for the system and that the reseller would have to contract directly with Thompson).

<sup>248/</sup> Hillman Dep. Tr. page 31, lines 18-23.

#### iv. Personnel Responsibilities

92. For reasons of efficiency and economy, all of the personnel who operate and manage the system are employed directly by Amcell.<sup>249/</sup> While the Management Agreement originally allowed Thompson the option of supplying his own personnel for the system, relying on Amcell only for its management expertise, that unusual arrangement would have been awkward and difficult to manage effectively.<sup>250/</sup> ETC does not have any employees other than Thompson, who serves as President and the company's sole director.<sup>251/</sup> This arrangement is consistent with the industry norm for turnkey management/switching of a cellular system.<sup>252/</sup> Although Thompson does not have authority to fire any of Amcell's employees directly, he does have the ability to terminate the management relationship if he is not happy with their performance.<sup>253/</sup> To date, however, Thompson has been very satisfied with the performance of all of Amcell's employees.<sup>254/</sup>

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<sup>249/</sup> Thompson Dep. Tr. page 34, lines 19-24.

<sup>250/</sup> Thompson Dep. Tr. page 35, lines 5-10.

<sup>251/</sup> Thompson Dep. Tr. page 34, lines 12-15.

<sup>252/</sup> Riley Dep. Tr. page 16, line 23 through page 17, line 8.

<sup>253/</sup> Lokting Dep. Tr. page 96, lines 11-16.

<sup>254/</sup> Thompson Dep. Tr. page 35, lines 21-24.

**v. Financial Obligations**

93. ETC is solely responsible for all the financial obligations of the Atlantic City system. The money to pay for all system expenses comes out of accounts controlled by ETC.<sup>255/</sup> Thompson determines who has access to those accounts, and in fact, has limited such access to only a few Amcell employees.<sup>256/</sup> Thompson also sets the maximum amount of money that a particular system employee can draw from the accounts.<sup>257/</sup> Thompson is ultimately responsible for determining how the money in the accounts will be used.<sup>258/</sup>

94. Amcell has made no payments into the system.<sup>259/</sup> As discussed above, financing for the system's construction was obtained by ETC through a loan from Provident Bank.<sup>260/</sup>

95. Amcell prepares a quarterly financial report for the system for Thompson's signature in accordance with Generally Accepted Accounting Principles. Thompson and Lokting review the report and Thompson is ultimately responsible for its content.<sup>261/</sup>

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<sup>255/</sup> Thompson Dep. Tr. page 43, line 23 through page 44, line 1.

<sup>256/</sup> Thompson Dep. Tr. page 44, lines 6-8.

<sup>257/</sup> Thompson Dep. Tr. page 44, lines 9-12.

<sup>258/</sup> Thompson Dep. Tr. page 44, lines 13-15.

<sup>259/</sup> Lokting Dep. Tr. page 90, lines 1-4.

<sup>260/</sup> Thompson Dep. Tr. page 40, line 21 through page 41, line 1.

<sup>261/</sup> Sauder Dep. Tr. page 15, lines 3-24.

96. In addition to the routine auditing performed by Amcell, the accounting firm of Deloitte & Touche conducts a yearly independent audit of the system on behalf of ETC.<sup>262/</sup>

**vi. Receipt of Monies and Profits**

97. As the party in control of the system, ETC receives all funds derived from its operation. The system revenue is collected by Amcell and deposited directly into accounts controlled by ETC.<sup>263/</sup> There is no comingling of the system's funds with accounts controlled by Amcell.<sup>264/</sup>

98. ETC is entitled to 50.01% of the system's profits, with the remaining 49.99% going to the minority interest holders under the CMS Agreement. Thompson is solely responsible for determining when profit disbursements will be made; Amcell has no control over the matter.<sup>265/</sup> The only restraint on Thompson's ability to order distributions are provisions in the loan agreement with Provident Bank giving the bank approval over of disbursements to assure the financial soundness of the system.<sup>266/</sup>

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<sup>262/</sup> Lokting Dep. Tr. page 84, lines 20-25.

<sup>263/</sup> Thompson Dep. Tr. page 46, lines 9-12.

<sup>264/</sup> Lokting Dep. Tr. page 85, lines 6-13.

<sup>265/</sup> Lokting Dep. Tr. page 86, line 24 through page 88, line 6.

<sup>266/</sup> Lokting Dep. Tr. page 88, lines 11-17; Thompson Decl. ¶ 25; Riley Dep. Tr. page 19, line 11 through page 20, line 8.

99. To date, there have been no disbursements made, other than those necessary for Thompson to fulfill his tax obligations.<sup>267/</sup> Instead, profits have been reinvested in the system to fund its expansion.<sup>268/</sup> Such expansion would otherwise have required the infusion of equity or additional debt capital.<sup>269/</sup> Reinvestment of profits is common business practice in the industry.<sup>270/</sup>

100. In 1991, Thompson considered making a \$400,000 distribution under the CMS Agreement but ultimately decided against the action for business reasons relating to the litigation over the CMS Agreement, among others.<sup>271/</sup> One of the key issues in the civil litigation in Oregon was what form of entity Thompson would have to establish under the agreement to bring the minority interest holders into equity ownership.<sup>272/</sup> Concerned after years that the litigation might be never ending, Thompson, prior to the release of the HDO, initiated the process of issuing a distribution in the fall of 1994.<sup>273/</sup> Through Lokting, he requested approval of the

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<sup>267/</sup> Lokting Dep. Tr. page 88, lines 18-21.

<sup>268/</sup> Lokting Dep. Tr. page 89, lines 17-23.

<sup>269/</sup> Lokting Dep. Tr. page 89, lines 17-19.

<sup>270/</sup> Riley Dep. Tr. page 20, lines 9-20.

<sup>271/</sup> Thompson Dep. Tr. page 43, lines 10-17; Lokting Dep. Tr. page 89, lines 6-16.

<sup>272/</sup> See generally supra part III ¶ 48. The TDS option specified creation of a limited partnership, while Amcell claimed that the CMS Agreement compelled formation of an entity with undifferentiated ownership interests.

<sup>273/</sup> Lokting Dep. Tr. page 86, line 20 through page 87, line 14; Lokting Dep. Tr. Exhibit 3 (letter from Lokting to Jeffrey Smith informing him of Thompson's intention to make a \$400,000 distribution to CMS interest holders).

distribution through Provident's legal counsel.<sup>274/</sup> The requirement for such approval is a fairly standard feature of loan agreements in the cellular industry.<sup>275/</sup> Lokting provided all necessary financial information to Provident, and he and Thompson met with Provident representatives to discuss the request.<sup>276/</sup> Provident has now approved the distribution.<sup>277/</sup> However, at Thompson's election, with the release of the HDO, the distribution has been deferred pending the resolution of the instant proceeding.<sup>278/</sup> It is Thompson's intention that, once the grant of his license becomes final, he will bring the minority parties under the CMS Agreement into equity ownership of the system.<sup>279/</sup> At that point, those parties would be entitled to distributions on a pro-rata basis.<sup>280/</sup>

101. Thompson receives a salary from ETC. As President and sole shareholder of ETC, Thompson determines and pays his own salary, currently around \$12,000 a month.<sup>281/</sup> Amcell plays no role in the setting of the salary.<sup>282/</sup>

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<sup>274/</sup> Thompson Decl. \*\*

<sup>275/</sup> Riley Dep. Tr. page 19, line 11 through page 20, line 8.

<sup>276/</sup> Thompson Decl. \*\*

<sup>277/</sup> Lokting Dep. Tr. page 88, line 22 through page 89, line 5.

<sup>278/</sup> Thompson Decl. ¶ 30.

<sup>279/</sup> Lokting Dep. Tr. page 87, lines 4-9.

<sup>280/</sup> Lokting Dep. Tr. page 87, lines 9-11.

<sup>281/</sup> Thompson Dep. Tr. page 46, lines 13-25; Hillman Dep. Tr. page 64, line 1 through page 65, line 3.

<sup>282/</sup> Thompson Dep. Tr. page 46, lines 13-25; Hillman Dep. Tr. Exhibit 12 (letter from Anna Hillman to Thompson acknowledging that Thompson is ultimately solely responsible for setting his own salary).



102. Though Thompson has long expected that, depending on the outcome of the civil litigation, either TDS or Amcell would exercise its respective option, it was always his expectation that until the system was sold he would be in a position to receive profits from the system.<sup>283/</sup> As previously noted, Thompson negotiated a provision into the Exercise Agreement with Amcell which factors the system's retained earnings into the price that Amcell will pay for the system at closing.<sup>284/</sup> Accordingly, he has consistently reviewed the system's performance and implemented decisions to maximize its profitability.<sup>285/</sup>

#### **IV. ANALYSIS**

##### **A. The Hearing Designation Order's Concerns**

103. In designating this case for hearing following remand, the Commission found that its prior order had failed to take into account certain relevant circumstances bearing on the ultimate question of control of the Atlantic City system. The relevant circumstances so noted were: (1) Amcell's status as the prospective purchaser of the system; (2) the apparent failure of Thompson to receive profits; (3) Amcell's substantial financial exposure; (4) Amcell's specific assumption of control over litigation related to its management; (5) Amcell's broad management responsibilities under a long-term agreement; and (6) the consolidation of the facilities and staff

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<sup>283/</sup> Thompson Decl. ¶ 26.

<sup>284/</sup> See supra part III ¶ 33.

<sup>285/</sup> Thompson Decl. ¶ 26.